

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1967

No. 638

CHENG FAN KWOK (A 15 355 927),

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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Jurisdiction

The Judgment of the Court of Appeals was entered on August 4, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1); the petition for a writ of certiorari having been filed on September 20, 1967 and the certiorari having been granted January 29, 1968.

Questions Involved

I. Does the United States Court of Appeals have initial jurisdiction to review an Order of the Immigration and Naturalization Service denying an administrative stay of deportation?

II. Is the initial jurisdiction of the Court of Appeals limited to reviews of Orders made as an integral part of the deportation proceedings?

Statute Involved

Immigration and Nationality Act of 1952, as amended:

> "Sec. 106.(a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U. S. C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, . . . ".

Statement

The petitioner is a native and citizen of China who entered the United States as a crewman on November 24, 1965. He was afforded a hearing in deportation on the 3rd day of March, 1966, where he conceded deportability, but was granted the privilege of voluntary departure. An appeal was taken to the Board of Immigration Appeals which was dismissed by the Board of Immigration Appeals on April 5, 1966.* Thereafter, the petitioner was given until May 11, 1966 to depart voluntarily from the United States. When he did not depart, a notice was sent to the petitioner directing him to surrender on June 20, 1966 for deportation to Hong Kong. Prior thereto, the petitioner filed an application with the Immigration and Naturalization Service asking that his deportation be stayed on the basis that he was a refugee from the Mainland of China and that he wished to remain in the United States until such time as his application for classification as a refugee, pursuant to Section 203(a)(7) of the Immigration and Nationality Act of 1952, as amended, could be adjudicated. The petitioner alleged in his application that since there was no office in Hong Kong where he could make such an application, that the District Director in Newark, New Jersey rule on his application for classification as a refugee.

The respondent notified the petitioner, in writing (App. 6a) that his application for a stay of deportation was denied since he could not adjust his status in the United States as he had not resided here for two years. This decision was further elaborated on by the Government in

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* The appeal to the Board of Immigration Appeals was an appeal from a collateral issue which did not effect the deportability and was not raised in the petition to review.

their supplemental brief filed in the Circuit Court of Appeals indicating that they were denying the stay on the basis that the District Director did not have the authority to rule on the petitioner's application for classification as a refugee in the United States.

The petitioner then commenced this action pursuant to Section 8 U. S. C. 1105(a), Section 106(a) of the Immigration and Nationality Act of 1952, as amended, in the United States Court of Appeals for the Third Circuit, alleging that he was entitled to apply for classification as a refugee in the United States since the regulations promulgated by the Attorney General did not establish an office to apply for such relief in Hong Kong, the country to which he was to be deported. In fact, the application could only be made in seven countries in the world, all located in Europe, and this regulation arbitrarily eliminated him from applying for conditional entry into the United States; and, for a determination stating that the denial of the application for a Stay of Deportation was improper.

In this petition for review filed in the Third Circuit, the Order of the Board of Immigration Appeals of April 5, 1966 was not attacked by the petitioner. The sole complaint of the petitioner was that the denial of the application for a stay of deportation was improper and that the regulations barring him were also improper.

On August 4, 1967 the Court of Appeals for the Third Circuit dismissed the petition on the grounds that it had no initial jurisdiction over the matter and that the review of a denial of a stay of deportation properly belonged in the United States District Court. Thereafter, a petition for a writ of certiorari was filed in the United States Supreme Court and the petition for the writ was granted on January 29, 1968.

ARGUMENT

Point I

The denial of a stay of deportation is a "final order of deportation". The issue at the bar is one in which the sole question involved is what the intention of Congress was when they enacted Section 106(a) in September of 1961. Did they mean that only a final order of deportation made by the Special Inquiry Officer, which is subject to review by the Board of Immigration Appeals, is the only final order that is reviewable by the Court of Appeals, or, did they mean that the final administrative order of deportation is an order that can also be reviewed in the Court of Appeals? It is the petitioner's position that the effective final administrative order of deportation is the one reviewable initially in the Court of Appeals.

The petitioner herein is not seeking a review of the order of the Special Inquiry Officer or of the Board of Immigration Appeals; he is seeking a review of a decision by a District Director of the Immigration Service denying petitioner a stay of deportation. If the alien's application for a stay of deportation had been granted, the alien's deportation would not be effected. Since it was denied, this was a final order as, otherwise, he would have been physically expelled if not for this action.

This argument has been sustained by the Seventh Circuit. In *Blagaic* v. *Flagg*, 304 F. 2d 623, petitioner sought review of a decision of the Regional Commissioner denying his application for a stay of deportation pursuant to Section 243(h). The Court of Appeals retained jurisdiction and said:

"The language of Section 1105(a) is clear and unambiguous. Jurisdiction now lies initially in the courts of appeals to review 'final orders of deportation' made pursuant to 8 U. S. C. A., Sec. 1252(b). We think, however, that the review provisions of Section 1105(a) should not be given the narrow interpretation that the Government contends for.

While it is true that the only question is whether the Attorney General has abused his discretion in refusing to withhold deportation under the provisions of Section 1253(h), this question involves the execution or suspension of the deportation order, and therefore it is ancillary to the order. If the withholding of deportation is not granted, petitioner will be deported; thus, in a realistic sense the denial of a stay is a part of the deportation order." *Id.* at 625.

This situation, of course, would not occur today since the administrative regulations with reference to 243(h) hearings have now been changed by administrative regulation and since the decision on this application is now made by a Special Inquiry Officer, which is reviewable by the Board of Immigration Appeals. There is no question that now an application, pursuant to Section 243(h) would be reviewable in the Court of Appeals. In the case of *Roumeliotis v. Immigration and Naturalization Service,* 304 F. 2d 453 (7th Cir. 1962), cert. denied, 371 U. S. 921, the Court of Appeals took jurisdiction over denial of a first preference visa application since it relates to the status of an alien and is ancillary to the deportation order issued against the petitioner.

In the case at the bar the situation is the same as the case decided by the Seventh Circuit. Petitioner is seeking

a stay of the execution of the deportation order. That it does not involve Section 243(h) is of no moment. If there had been no deportation order, no application for stay would have been made. The application for a stay of deportation is inherently related to the deportation proceeding and must be considered ancillary to it.

In *Foti* v. *Immigration and Naturalization Service*, 375 U. S. 217, this Court held that the refusal of the Attorney General to grant suspension of deportation was reviewable in the Court of Appeals under Section 106(a). This Court broadly construed the legislative history of the statute as evidencing the plain objective of the Congress to eliminate piecemeal judicial review. At page 223 of this decision, the court stated as follows: "Representative Lindsay suggested that the legislative history should make absolutely clear 'that if there is any remedy on the administrative level left of any nature, that the deportation order will not be considered final'. Representative Walter agreed and stated that 'the final order means the final administrative order.'" In the case at the bar, the application to the District Director would be the last administrative remedy left to the alien, to wit, an application for a stay of deportation after deportability has been determined by the Special Inquiry Officer and when no relief is available to the alien at a 242(b) proceeding. This interpretation, although a broad one, is not injurious to anyone. Later, in the Foti decision, this court stated "review of the denial of discretionary relief is ancillary to the deportability issue, and both determinations should therefore be made by the same court at the same time. We realize that deportability is conceded in a large number of cases. But this fact hardly detracts from our view as to a proper interpretation of Section 106(a)".

This court further extended the jurisdiction of the Court of Appeals to include review of orders refusing to reopen deportation proceedings, an application made after the hearing. See *Giova* v. *Rosenberg*, 379 U. S. 18 (1964). (It should be noted, however, that the motion to reopen involving Giova had been considered and denied by the Board of Immigration Appeals incident to it's review of the deportation order and not by a District Director's order.)

There are other courts that have come to a different conclusion than the Court of Appeals for the Third Circuit, to wit, *Melone* v. *INS*, 355 F. 2d 533 (C. A. 7, 1966); *Skiftos* v. *INS*, 332 F. 2d 203 (C. A. 7, 1964); *Televera* v. *Pederson*, 334 F. 2d 52 (C. A. 6, 1964).

It was the announced intention of the Congress in 1961 to amend and limit the right of judicial review of deportation orders of aliens in the United States. The stated purpose of Section 106, "is to create a single, separate, statutory review of administrative orders for the deportation and exclusion of aliens in the United States". H. R. Report #1086, 87th Congress, 1st Session, page 22. A determination by this Court that the Court of Appeals had initial jurisdiction of this matter would correspond with the declared purpose of Congress.

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that the judgment of the Court of Appeals should be reversed and that the cause should be remanded to that Court with directions to entertain the petition for review.

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